

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 RUBEN SANCHEZ,

10 Plaintiff,

11 v.

12 UNITED STATES OF AMERICA, et al.,

13 Defendants.

CASE NO. C08-5246BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
UNITED STATES' MOTION  
TO DISMISS

14 This matter comes before the Court on the United States' Motion to Dismiss  
15 Pursuant to Fed. R. Civ. P. 12(b)(1). Dkt. 8. The Court has considered the pleadings filed  
16 in support of and in opposition to the motion and the remainder of the file and hereby  
17 grants in part and denies in part the motion for the reasons stated herein.

18 **I. FACTUAL AND PROCEDURAL BACKGROUND**

19 On or about September 3, 2006, Plaintiff visited the Post Exchange Barbershop  
20 ("the Barbershop") located on the Fort Lewis Army base in Washington State, for a  
21 barber appointment. During Plaintiff's barber appointment, his neck was nicked by the  
22 barber. Plaintiff noticed the injury after the haircut. By the time Plaintiff returned home,  
23 the injured area was swollen and infected. The injury reached the point that Plaintiff was  
24 forced to visit the emergency room for treatment. The emergency room diagnosed  
25 Plaintiff as suffering from a staph infection and Cellulitis. Treatment for the injury  
26 required the area to be lanced several times. Plaintiff visited the hospital emergency room  
27  
28

1 on two separate occasions after the initial treatment due to complications from the  
2 original injury.

3 The Barbershop is located in the Fort Lewis Post Exchange complex on the Fort  
4 Lewis Army Base, and is operated and managed by Defendant Gino Morena Enterprises,  
5 LLC (“Gino Morena”), d/b/a Post Exchange Barbershop, pursuant to a contract between  
6 the Department of the Army, through its Army and Air Force Exchange Service  
7 (“AAFES”), and Gino Morena.

8 **A. Gino Morena – United States Contract**

9 At all times relevant to this action, Gino Morena was a contractor of the United  
10 States and is referred to as such in the contract between Gino Morena and the United  
11 States (“the contract”). The barbers at the Barbershop were hired and paid by Gino  
12 Morena, and not the United States. The contract specifies that Gino Morena “will not  
13 represent itself to be an agent or representative of AAFES, or any other agency or  
14 instrumentality of the United States.” Dkt. 8-2 at 20. In addition, the contract required  
15 Gino Morena to represent that it “has/had a direct involvement in the day-to-day  
16 operation of the business [including] responsibility for employment, supervision,  
17 scheduling, production/services, payroll, and purchasing.” *Id.* at 9. It also required Gino  
18 Morena to “insure that the barber shop facility is kept clean and orderly at all times, and  
19 that sanitary procedures include a thorough daily cleaning of wall units, chairs, and floors.  
20 Personal hygiene will be practiced by all barbers at all times.” *Id.* at 26. The contract  
21 further required Gino Morena to practice various sanitation methods, including  
22 “[c]lean[ing] all instruments immediately after they are used for each customer . . .  
23 thoroughly [with] soap and hot water.” *Id.* at 27.

24 Finally, the indemnity and hold harmless provision of the contract states, in part:

25 Contractor will indemnify, hold harmless, and defend AAFES and all  
26 other agencies and instrumentalities of the United States, their agents,  
27 representatives, employees and customers from any and all suits,  
28 judgments and claims . . . which arise out of any loss, damage, or  
injury alleged or established to have arisen out of or in connection  
with any other acts or omissions of the contractor, unless such loss,

1 damage, or injury was caused by or resulted solely from the acts or  
2 omissions of AAFES, its agents, representatives, or employees.

3 *Id.* at 18.

4 In response to the United States' motion to dismiss, Plaintiff does not dispute the  
5 existence of these contract terms. Plaintiff contends that the terms of the contract are  
6 "strict guidelines as to the procedure and practices [that were] forced upon Gino Moreno  
7 by the United States Army." Dkt. 10 at 2.

8 **B. Plaintiff's Administrative Claim and Civil Complaint**

9 In September 2007, Plaintiff served an administrative claim (an "SF 95 claim") for  
10 damages on the Department of the Army in Fort Lewis. More than six months elapsed  
11 from the filing of this claim until Plaintiff filed his complaint in this Court. Apparently,  
12 the administrative claim has neither been adjudicated nor denied during the statutory  
13 administrative period and the administrative period has now expired. Plaintiff's SF 95  
14 claim alleged as follows:

15 **[Section] 8. Basis of Claim**

16 Mr. Sanchez was injured at the Barber Shop that operates in the main PX  
17 Building on Fort Lewis. A small nick on the back of Mr. Sanchez's head was  
18 noticed by him after leaving the barber shop. He noticed the area began  
19 swelling when he got to his house. This area had become infected and had to  
20 be lanced several times. At the Hospital, Mr. Sanchez was not only diagnosed  
21 with a staph infection but also Cellulitis. Mr. Sanchez was forced to go to the  
22 emergency room on two separate occasions and missed time from work . . . .

19 **[Section] 10. Personal Injury/Wrongful Death**

20 Mr. Sanchez received a staph infection after going to the Barbershop that  
21 operates in the main PX building on Fort Lewis. [T]his infection required  
22 trips to the Emergency Room and follow up. Mr. Sanchez lost time from  
23 work [due] to this injury.

24 Dkt. 1, 8-9.

25 On April 17, 2008, Plaintiff filed a complaint in this Court. Plaintiff alleges that,  
26 "[o]n information and belief, the U.S. Government, under the auspices of the Department  
27 of the Army, operates Gino Morena Enterprises, LLC d/b/a Post Exchange Barbershop"  
28 and that "Gino Morena . . . is an agent of the U.S. Government." *Id.* at 2. Plaintiff alleges

jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346, 28 U.S.C. § 2675(a), and 39 C.F.R. 912.9(a).

Plaintiff alleges that his injury “occurred as a direct and proximate cause of the tortuous conduct and/or negligence and carelessness of Defendant Department of the Army (“Army”) in that it negligently operated and maintained an unsafe, unhygienic, and unsanitary barber service.” *Id.* at 4. Plaintiff further alleges that the Army “failed to comply with applicable safety and hygienic standards and regulations, failed to exercise ordinary care to keep the barber service in a reasonably safe, hygienic, and sanitary condition, . . . failed to warn customers, including Plaintiff, of these [unsafe] conditions, . . . [and] failed to adequately supervise Gino Morena . . . to ensure compliance with applicable safety and hygienic standards.” *Id.* Plaintiff also alleges negligence on the part of the Defendant United States “in that it negligently provided unsafe, unhygienic, and unsanitary conditions, . . . failed to comply with [safety] standards and regulations, and it negligently failed to adequately supervise the Department of the Army and Gino Morena.” *Id.*, 5-6. Finally, Plaintiff alleges that Defendant Gino Morena was negligent and caused Plaintiff’s injuries.

### **C. United States’ Motion to Dismiss**

On August 14, 2008, the United States filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. Dkt. 8. The United States contends that the Court lacks subject matter jurisdiction over Plaintiff’s claims under the “independent contractor exception” to the Federal Torts Claim Act (“FTCA”), because all of Plaintiff’s claims arise from alleged negligence of independent contractors of the United States. The United States also moves to dismiss the Army as a defendant because federal government agencies may not be sued under the FTCA.

On August 29, 2008, Plaintiff filed a response. Dkt. 10. Plaintiff contends that the independent contractor exception does not apply because Plaintiff’s injuries were not only a result of negligent conduct of the “independent contractor,” but also the negligence of

1 the United States for its failure to ensure and maintain sanitary and hygienic conditions at  
2 the Barbershop. Plaintiff maintains that because the United States provided Gino Morena  
3 with detailed instruction on how to perform its work, the United States had control over  
4 the Barbershop, thus overcoming the independent contractor exception. In addition,  
5 Plaintiff contends that because “there is a high probability that [Plaintiff’s] infection was  
6 in fact caused by contaminated water or [the] sewage system at the base,” which is under  
7 the Army’s control, the Army is responsible for Plaintiff’s injuries. Dkt. 10, 4-5. Finally,  
8 Plaintiff urges the Court to deny the United States’ motion to dismiss because the  
9 jurisdictional issue raised by the United States is not separable from the merits of  
10 Plaintiff’s complaint.

11 On September 5, 2008, the United States filed a reply. Dkt. 12. The United States  
12 contends that the independent contractor exception applies because Plaintiff fails to  
13 demonstrate that the United States oversaw “day-to-day operations” of the Barbershop.  
14 The United States further contends that Plaintiff’s allegations that the water may have  
15 caused Plaintiff’s infections are improper because (1) Plaintiff failed to include this claim  
16 in his complaint, (2) even if there was an issue with the water quality, Gino Morena  
17 would be liable because it was under contractual obligation to ensure sanitary conditions  
18 at the Barbershop, and (3) Plaintiff’s allegations of poor water quality were not included  
19 in his administrative claim. Finally, the United States contends that its motion to dismiss  
20 for lack of subject matter jurisdiction is not intertwined with the merits of Plaintiff’s  
21 action.

## 22 II. DISCUSSION

### 23 A. Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1)

24 Plaintiff urges the Court to deny the United States’ motion to dismiss because “the  
25 material facts, whether the Army is in fact culpable[,] go to the merits of the case . . .  
26 [and] it is clear that the issue of jurisdiction and substance are so intertwined that the  
27 Court cannot separate the jurisdictional issue from the merits.” *Id.*, 5-6.

1 A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the  
2 factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise  
3 under the Constitution, laws, or treaties of the United States, or does not fall within one of  
4 the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a  
5 case or controversy within the meaning of the Constitution; or (3) is not one described by  
6 any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus.,*  
7 *Inc. v. Tinnerman*, 626 F. Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331  
8 (federal question jurisdiction) and 1346 (United States as a defendant). When  
9 considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the  
10 face of the pleadings, but may review any evidence to resolve factual disputes concerning  
11 the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.  
12 1988), *cert. denied*, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d  
13 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter  
14 jurisdiction until the plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co.*  
15 *of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221,  
16 1225 (9th Cir. 1989). Therefore, the plaintiff bears the burden of proving the existence of  
17 subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc.*  
18 *v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

19 A review of the complaint shows that the merits of this claim are separable from  
20 consideration of the Court's jurisdiction. Consideration of the United States' motion to  
21 dismiss on the basis of lack of subject matter jurisdiction will not involve an improper  
22 "intertwining" of jurisdictional and substantive issues. The Court can determine whether  
23 Gino Morena is an independent contractor for the purpose of determining whether the  
24 "independent contractor exception" under the FTCA applies, and thus whether subject  
25 matter jurisdiction exists, without considering Plaintiff's injuries or the merits of his tort  
26 claims.

1 In order to determine whether subject matter jurisdiction exists, the Court may  
2 look to the terms of the contract. The parties here do not dispute the existence of a  
3 contract between the United States and Gino Morena. As will be discussed below, the  
4 Court must determine whether Gino Morena was an independent contractor or an agent of  
5 the United States in order to determine whether the United States has waived its sovereign  
6 immunity under the FTCA. *See Williams v. United States*, 50 F.3d 299, 303-305 (4th Cir.  
7 1995) (finding that, under circumstances similar to this case, the district court should have  
8 dismissed the plaintiff's case under the FTCA on the basis of lack of subject matter  
9 jurisdiction rather than on summary judgment); *see generally Autrey v. United States*, 424  
10 F.3d 944 (9th Cir. 2005) (looking to the terms of the contract to determine whether the  
11 district court had subject matter jurisdiction).

12 **B. Plaintiff's Claims Against the United States Army**

13 The United States moves the Court to dismiss Plaintiff's claims against the  
14 Department of the Army because the Army may not be sued under the FTCA. Plaintiff  
15 did not address this issue in his response.

16 Liability under the FTCA applies exclusively to the United States, and does not  
17 extend to agencies of the United States. 28 U.S.C. § 2679(a), *see also* 28 U.S.C. §  
18 1346(b). "The United States is the only proper defendant in an FTCA action." *Lance v.*  
19 *United States*, 70 F.3d 1093, 1095 (9th Cir. 1995).

20 Accordingly, all of Plaintiff's claims under the FTCA against the Department of  
21 the Army are dismissed.

22 **C. Plaintiff's Claims Against the United States Alleging Negligent Supervision of**  
23 **Gino Moreno and Liability for Gino Morena's Alleged Negligent Acts or**  
**Omissions under the FTCA**

24 The United States moves the Court to dismiss Plaintiff's claims against the United  
25 States based on the "independent contractor exception" under the FTCA.

26 Under the FTCA, the federal government is liable to the same extent as a private  
27 party for certain torts of federal employees acting within the scope of their employment,  
28

1 “in accordance with the law of the place where the act or omission occurred.” *Autrey v.*  
2 *United States*, 424 F.3d 944, 956 (9th Cir. 2005) (citing 28 U.S.C. § 1346(b)(1) and §  
3 2674). “The language of 28 U.S.C. § 1346(b) is unambiguous, covering injuries caused  
4 by the negligent or wrongful act or omission of any employee of the Government.”  
5 *United States v. Orleans*, 425 U.S. 807, 813 (1976). The FTCA defines government  
6 employees to include officers and employees of any federal agency, but excludes “any  
7 contractor of the United States.” *Id.* at 813-814.

8 To determine whether a party is an independent contractor or an agent of the  
9 federal government under the FTCA, courts look to the terms of the contract between the  
10 party and the federal government. *See Williams v. United States*, 50 F.3d 299, 305 (4th  
11 Cir. 1995). A party may be considered an independent contractor pursuant to the FTCA  
12 even if contractual provisions “fix specific and precise conditions to implement federal  
13 objectives,” including “standards designed to secure federal safety objectives.” *Autrey*,  
14 424 F.3d at 957 (citations omitted). “The critical test for distinguishing an agent from a  
15 contractor is the existence of federal authority to control and supervise the ‘detailed  
16 physical performance’ and ‘day-to-day operations’ of the contractor.” *Id.* at 956 (*quoting*  
17 *Hines v. United States*, 60 F.3d 1442, 1446 (9th Cir. 1995)). A contractor’s status is not  
18 changed from independent contractor to agent or employee unless the federal government  
19 exercises “substantial supervision over the day-to-day operations of the contractor.” *Id.* at  
20 957 (*quoting Orleans*, 425 U.S. at 816). “Courts are not free to ‘abrogate the  
21 [independent-contractor] exemption’ for the negligent acts of contractors regardless of  
22 whether there is a good reason for so doing.” *Id.* (*quoting Hines*, 60 F.3d at 1447 (internal  
23 citations omitted)).

24 Here, Plaintiff contends that the independent contractor exception does not apply  
25 because Plaintiff’s injuries were caused not only by the negligence of Gino Morena, but  
26 also “the negligence of the United States Department of the Army and its failure to ensure  
27 and maintain sanitary and hygienic conditions at the Barbershop.” Dkt. 10, 1-2. Plaintiff  
28



1 also contends that the exception does not apply because “the strict guidelines as to  
2 procedure and practices [were] forced upon Gino Moren[a] by the United States Army,  
3 subject[ing] the United States to liability under the FTCA.” *Id.* at 2. Specifically, Plaintiff  
4 contends that the independent contractor exception does not apply because the United  
5 States provided specific detail as to how Gino Morena was to perform its work,  
6 “including but not limited to, where the workers are exposed to communicable diseases,  
7 how to dispose of hair, sanitize equipment, and preparing hot compresses,” as well as  
8 instructions as to how Gino Morena was to clean the Barbershop.

9 In support of Plaintiff’s argument that the independent contractor exception does  
10 not apply, Plaintiff cites two cases: *Pumphrey v. Manor Real Estate & Trust Co.*, 176  
11 F.2d 414 (4th Cir. 1949), and *Schetter v. Housing Authority*, 132 F. Supp. 149 (W.D. Pa.  
12 1955). These cases are not precedential on this Court.

13 The record shows that Gino Morena was not an agent of the United States under  
14 the FTCA because it was given control over the day-to-day operations of the Barbershop,  
15 and because Plaintiff fails to demonstrate that the United States was involved in day-to-  
16 day operations. Thus, the independent contractor exception applies as to Gino Morena’s  
17 alleged negligent acts or omissions relating to its operation of the Barbershop, as covered  
18 by the contract entered into by Gino Morena and the United States. This conclusion is  
19 supported by *Autrey* and other case law in the Ninth Circuit, as well as a Fourth Circuit  
20 case, *Williams*.

21 In *Autrey*, victims of a wildfire who had filed suit under the FTCA, alleging  
22 negligence against the United States for failing to maintain firebreaks, appealed a district  
23 court’s dismissal for lack of subject matter jurisdiction. *Autrey*, 424 F.3d at 948. The  
24 Ninth Circuit affirmed the district court’s dismissal, holding that the independent  
25 contractor exception applied because the United States had delegated responsibility for  
26 fire protection to a contractor. *Id.* at 957. The Ninth Circuit concluded that because the  
27 government did not direct the actual performance of the contractor or supervise or direct  
28

1 day-to-day operations, the contractor had not become a “*de facto* government employee”  
2 so as to trigger the United States’ waiver of sovereign immunity under the FTCA. *Id.*; *see*  
3 *also Letnes v. United States*, 820 F.2d 1517, 1518-1519 (9th Cir. 1987) (finding that the  
4 independent contractor exception applied when the United States did not supervise day-  
5 to-day operations of pilots, even though the governing contract included such provisions  
6 as mandating compliance with safety regulations and setting maximum work hours).

7 In *Williams*, the plaintiff alleged negligence against the United States after she  
8 sustained injuries from a slip and fall in a building leased by the United States. *Williams*,  
9 50 F.3d at 302. The Fourth Circuit held that the independent contractor exception applied  
10 because the United States had delegated to a contractor responsibilities to maintain the  
11 building with respect to repair, cleanliness and safety. Specifically, under the contract, the  
12 contractor was “fully responsible for the management, operation, maintenance and  
13 support operations” of the building premises; the contractor was also “responsible for the  
14 day-to-day inspection and monitoring of work performed to ensure compliance with the  
15 contract requirements.” *Id.* The Court based its holding in part on its finding that the  
16 United States exercised no day-to-day control or supervision over the contractor’s  
17 employees, but rather “the contract specified that ‘[the contractor] was to provide all  
18 management, supervision, labor, materials, [etc.].’” *Id.* at 303 and 307.

19 Similarly, in this case the United States delegated the responsibilities of operating  
20 the Barbershop solely to Gino Morena. Plaintiff has not offered any evidence, nor has he  
21 argued, that the United States was involved in the day-to-day control or supervision of the  
22 Barbershop. The contract between the United States and Gino Morena delegated  
23 responsibilities associated with the day-to-day operation of the Barbershop to Gino  
24 Morena, including employment decisions, payroll, purchasing, and maintenance and  
25 sanitization of the Barbershop. Plaintiff’s contention that the detailed instructions and  
26 nuances provided to Gino Morena are sufficient to overcome Gino Morena’s independent  
27 contractor status is without merit. As discussed above, the United States may impose  
28

1 detailed regulations; the independent contractor exception is not overcome unless the  
2 United States exercises day-to-day control or supervision over the contractor or its  
3 employees.<sup>1</sup>

4 Thus, the United States cannot be held liable for Gino Morena's negligent acts or  
5 omissions related to Gino Morena's operation of the Barbershop as delegated by the  
6 contract. Plaintiff's claims that the United States is liable for Gino Morena's acts or  
7 omissions, based on the theory that Gino Morena is an agent of the United States, are  
8 dismissed on the basis of lack of subject matter jurisdiction. Specifically, the United  
9 States cannot be held liable for alleged negligent acts that were specifically delegated to  
10 Gino Morena, including, but not limited to, Gino Morena's alleged failure to maintain a  
11 sanitary premises and sanitary equipment, its alleged failure to comply with applicable  
12 safety and hygienic standards and regulations, and its alleged failure to exercise ordinary  
13 care to keep the barber service reasonably safe, hygienic, and sanitary. In addition,  
14 because Gino Morena was an independent contractor, Plaintiff's claim that the United  
15 States negligently supervised Gino Morena is dismissed.

16 **D. Plaintiff's Claim Alleging Negligence Against the United States Arising from**  
17 **Possibly Contaminated Water or Sewage System**

18 In his response, Plaintiff contends that dismissal would be improper because there  
19 are pertinent facts bearing on the issue of jurisdiction, and thus discovery should be  
20 allowed. Plaintiff contends that there is "an array of pertinent facts bearing on the  
21 question of jurisdiction . . . includ[ing] but not limited to the Army's control over the  
22 water, sewage and sanitation system at [Fort Lewis]." Plaintiff further contends that  
23 "[t]here is a high probability that the infection was in fact caused by contaminated water  
24 or sewage system at the base."  
25  
26

---

27 <sup>1</sup> Plaintiff also argued that the United States "forced" the contract upon Gino Morena.  
28 Plaintiff offered no support for this contention.

1 In opposition, the United States contends that dismissal is warranted despite  
2 Plaintiff's allegations of contaminated water because (1) Plaintiff failed to include this  
3 claim in his complaint, (2) even if there was an issue with the water quality, Gino Morena  
4 would be liable because it was under contractual obligation to ensure sanitary conditions  
5 at the Barbershop, and (3) Plaintiff's allegations of poor water quality were not included  
6 in his administrative claim.

7 The Court concludes that Plaintiff's claim under the FTCA as it relates to an injury  
8 that is alleged to have resulted solely from the United States' act or omission should not  
9 be dismissed on the basis of lack of subject matter jurisdiction. Taking the Plaintiff's  
10 allegations as true, the Court cannot rule at this time that the United States delegated  
11 responsibility for ensuring the safety of the water at the Barbershop (which is presumably  
12 pumped in from a Fort Lewis water distribution system) to Gino Morena. Though the  
13 contract delegated responsibility to Gino Morena to maintain a sanitary Barbershop, it did  
14 not likely require Gino Morena to test the water supply for contaminants. Additionally,  
15 the Court notes that the indemnity and hold harmless provision of Gino Morena's and the  
16 United States' contract excludes injuries "caused by or result[ing] solely from the acts or  
17 omissions of AAFES, its agents, representatives, or employees." It is not clear at this time  
18 whether the United States, AAFES, or another entity would be responsible in the event  
19 the water supply was contaminated.

20 Plaintiff's civil complaint and administrative claim were sufficient under notice  
21 pleading standards and the requirements of 28 U.S.C. § 2675(a) to put the United States  
22 on notice of a claim alleging that contaminants in the Barbershop water supply may have  
23 caused Plaintiff's injury. First, Federal Rule of Civil Procedure 8(a), adopted in 1938,  
24 replaced the old "code pleading" regime under which plaintiffs had been required to plead  
25 detailed factual allegations in the complaint, or risk having their complaints dismissed on  
26 demurrer. Under the more relaxed "notice pleading" requirement of Rule 8(a), a plaintiff  
27 is not required to plead detailed facts. Under Rule 8(a), a plaintiff is required only to  
28

1 “advise the other party of the event being sued upon, . . . provide some guidance in a  
2 subsequent proceeding as to what was decided for purposes of res judicata and collateral  
3 estoppel, and . . . indicate whether the case should be tried to the court or to a jury. No  
4 more is demanded of the pleadings than this.” 5 Charles Alan Wright & Arthur R. Miller,  
5 Federal Practice & Procedure § 1202 (2008).

6 Second, “Section 2675(a) requires that a claimant or his legal representative file  
7 (1) a written statement [i.e. an administrative claim] sufficiently describing the injury to  
8 enable the agency to begin its own investigation, and (2) a sum certain damages claim.”  
9 *Warren v. United States Dep’t of the Interior Bureau of Land Management*, 724 F.2d 776,  
10 780 (9th Cir. 1984). Plaintiff’s administrative claim and complaint both sufficiently  
11 placed the United States on notice of Plaintiff’s factual allegation that the water system  
12 may have been contaminated, which in turn allegedly caused Plaintiff’s injuries. Plaintiff  
13 alleged that he suffered an injury when the back of his neck was nicked during a barber  
14 appointment; at the time of filing the claim or complaint, Plaintiff could not be expected  
15 to know whether the injury he suffered resulted from unsanitary equipment, contaminated  
16 water, the barber’s negligence, or another cause.

17 For these reasons, the Court denies the United States’ motion to dismiss as to  
18 Plaintiff’s allegations that his injuries may have been caused solely by the United States’  
19 own acts or omissions. Having found that Gino Morena is not an agent of the United  
20 States, the Court emphasizes that the United States is a proper party to this suit only to the  
21 extent that Plaintiff alleges that the United States acted negligently by acting or failing to  
22 act in a manner not covered by the contract.

### 23 **III. ORDER**

24 Therefore, it is hereby


25 **ORDERED** that the United States’ Motion to Dismiss (Dkt. 8) is **GRANTED in**  
26 **part** and **DENIED in part**, as follows:

1. The United States' Motion to Dismiss the Department of the Army as a defendant in this case is **GRANTED**, and all claims against the Department of the Army are **DISMISSED WITH PREJUDICE**;

2. The United States' Motion to Dismiss Plaintiff's claim against the United States based on contaminated water supply or sewage system is **DENIED**, and that claim may proceed; and

3. The United States' Motion to Dismiss as to all other claims against the United States based on Gino Morena's negligent acts and negligent supervision is **GRANTED**, and all remaining claims against the United States are **DISMISSED with prejudice**.

Dated this 8<sup>th</sup> day of October, 2008.

  
BENJAMIN H. SETTLE  
United States District Judge